No. 93-895

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

DONALD PLUMMER,

Petitioner,

against

SPRINGFIELD TERMINAL RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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(3529—1993)

QUESTION PRESENTED FOR REVIEW

I. Was the Court of Appeals in error in affirming the Trial Court's refusal to conduct a Voir Dire of, or otherwise receive evidence from, the trial jury panel to clarify its verdict by declaring such evidence to be forbidden by Federal Rule of Evidence 606(b) after learning that the amount of damages as announced by the jury in open court may have mistakenly been the net verdict to plaintiff that had been reduced by the plaintiff's contributory negligence instead of the gross verdict before reduction for plaintiff's contributory negligence?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES.....iv
A. CASES.....iv
B. OTHER AUTHORITIES.....v

OPINIONS BELOW 1

JURISDICTION.....2

STATUTES INVOLVED.....2

STATEMENT OF THE CASE.....3

STATEMENT OF FACTS.....8

ARGUMENT.....8

A. FEDERAL RULE OF EVIDENCE 606(b) DOES NOT PROHIBIT A JURY FROM TESTIFYING OR OTHERWISE PROVIDING EVIDENCE AS TO THE ACCURACY OF ITS VERDICT, AS SUCH TESTIMONY OR OTHER EVIDENCE WOULD BE IN THE NATURE OF CLARIFICATION AND NOT IMPEACHMENT OF ITS VERDICT.....9

B. THERE IS A FUNDAMENTAL CONFLICT BETWEEN THE HOLDINGS OF THE CIRCUIT COURTS OF APPEAL ON THE ISSUE AT BAR.....16

C. THE FIRST CIRCUIT COURT OF APPEALS' DIRECTIVE IN UNITED STATES v. KEPREOS DOES NOT BAR THE RELIEF SOUGHT, AS THE ULTIMATE GOAL OF THE COURT

SYSTEM IS FUNDAMENTAL FAIRNESS, NOT RAPID CASE DISPOSAL.....22

D. A JURY POLL WOULD NOT HAVE ADDRESSED THE ISSUE AT BAR....25

CONCLUSION.....27

TABLE OF AUTHORITIES CITED

A. CASES

Attridge v. Cencorp Div. of Dover Technologies Int'l, Inc., 836F.2d 113 (2nd Cir. 1987).....7,8,10,11,12,14,16,18,20,21

Audette v. Isaksen Fishing Corp., 789 F.2d 956, (1st Cir. 1986)....26

Ferrante v. Metro North Commuter Railroad, 738 F.Supp. 106 (SDNY, 1990).....13,14

Fox v. United States, 417 F.2d 84 (5th Cir. 1969).....12

Freid v. McGrath, 135 F.2d 833 (DC Cir. 1943).....12

Humphries v. District of Columbia, 174 U.S. 190 (1899).....26

Karl v. Burlington Northern R.R. Co., 880 F.2d 68 (8th Cir. 1989).....7,17,18

McCullough v. Consolidated Rail Corp., 937 F.2d 1167 (6th Cir. 1991).....18,21,22

McDonald v. Pless, 238 U.S.264 (1915).9,10

Peveto v. Sears, Roebuck & Co., 807 F.2d 486 (5th Cir. 1987).....16,17

Robles v. Exxon Corp., 862 F.2d 1201 (5th Cir. 1989).....16

Smith v. City of Seven Points, Texas, 608 F.Supp. 458 (ED Texas, 1985).....12

United States v. Boylan, 898 F.2d 230 (1st Cir. 1990).....24,25

United States v. Dotson, 817 F.2d 1127 (5th Cir. 1990).....17

United States v. Ford, 840 F.2d 460 (7th Cir. 1988).....21

United States v. Infelise, 813 F.Supp. 599 (N.D.Ill. 1993).....21

United States v. Kepreos, 759 F.2d 961 (1st Cir. 1985).....22,23

United States v. Moten, 582 F.2d 654 (2nd Cir. 1978).....23,24

University Computing Company v. Lykes-Youngstown Corp., 504 F.2d 518 (5th Cir.1974).....12

OTHER AUTHORITIES

Federal Employers' Liability Act, 45 U.S.C. §51 et seq.....3,8

Fed. R. of Criminal Procedure 31(d).....26

Fed. R. of Evidence 606(b) 2,8,9,11,17,20,21

Federal Rules of Evidence, Advisory Committee Notes.....9,16

J. Weinstein, Weinstein's Evidence, §606(04), pg. 606-40.....20,22

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the First Circuit, reported as No. 93-1125, 5 F.3d 1 (1st Cir. 1993) is reprinted as Appendix "A". It affirms a denial of the plaintiff's post-verdict motion to alter the judgment that had been entered by the United States District Court for the District of Maine on October 26, 1992, in Plummer v. Springfield Terminal Ry. Co., No. 91-0114-B (D. Maine Jan. 20, 1993), which Memorandum is reprinted as Appendix "B".

The judgment of the United States Court of Appeals for the First Circuit was entered on October 15, 1993. This petition is filed within ninety (90) days of that

date. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon Section 1254(1) of the Judicial Code (28 U.S.C. §1254(1)).

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on October 15, 1993. This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon Section 1254(1) of the Judicial Code (28 U.S.C. §1254(1)).

STATUTES INVOLVED

The relevant statutory provision is Rule 606(b) of the Federal Rules of Evidence, 28 U.S.C.S. Appendix, Rule 606(b), which reads as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror may

> not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

STATEMENT OF THE CASE

In 1992, Plaintiff commenced suit against defendant Springfield Terminal Railway Company under the aegis of the Federal Employers' Liability Act, 45 U.S.C. 51 et seq., for his injuries sustained while working as a carman for Defendant. Defendant answered the complaint, denying liability and alleging contributory negligence on the part of Plaintiff. The

case was tried in front of a jury with Magistrate Judge Eugene W. Beaulieu presiding from October 19 through 23, 1992, in the United States District Court for the District of Maine in Bangor, Maine.

Following the trial of this case, the jury was instructed on the law by the Trial Court, provided with a Special Verdict Form to record their findings, and sent to deliberate their verdict. After three hours of deliberation, the jury announced it had reached a verdict, and the Court was called to order, at which time it was discovered that Interrogatory #6 on the Special Verdict Form, which called for the amount of damages the jury felt would fairly and adequately compensate the plaintiff for his injuries, had not been

answered. After being sent back to conclude its deliberations by placing a monetary figure in Interrogatory #6, the jury returned with a monetary figure of $78,000.00 as its response to Interrogatory #6.

There was great concern on the part of the plaintiff that the jury's award as stated on the Court's Special Verdict Form had already been reduced by the degree of fault it had apportioned to the plaintiff, by virtue of the fact that the jury initially had come in without having answered Interrogatory #6 of the Special Verdict Form. This concern had been related to the court by plaintiff's attorney at a sidebar conference, and a request by plaintiff's counsel was made for an inquiry by the Court as to whether

the figure reflected the gross verdict, or the net verdict to the plaintiff after subtraction for contributory negligence. Following the court's declination to make such an inquiry, it was announced that the verdict was for the sum of $78,000.00, which was reduced 88% by the Court in accordance to the jury's findings of 88% contributory negligence on the part of the plaintiff. On October 26, 1992, judgment in the amount of $9,360 was entered.

In a later conversation with plaintiff's attorney, the foreperson of the jury stated, in no uncertain terms, that the jury had intended the figure of $78,000.00 to be the net verdict to the plaintiff. Plaintiff thereafter immediately advised the Trial Court, who refused to reconvene the jury and inquire further based upon

this information. Thereafter, the Trial Court entered judgment in the amount of $9,360.00 on October 26, 1992. Plaintiff timely filed his Motions to Alter Judgment on November 2, 1992, but on January 23, 1993, the Trial Court issued an Order denying Plaintiff's motion.

On appeal, the Court of Appeals for the First Circuit affirmed, concluding its interpretation of Federal Rule of Evidence 606(b) precluded the relief sought by the plaintiff, and that the Eighth Circuit Court of Appeals decision in Karl v. Burlington Northern Ry. Co., 880 F.2d 68 (8th Cir. 1989) better reflected its view of the case, despite clear and pertient precedent in the Second Circuit Court of Appeals in Attridge v. Cencorp Div. of Dover Technologies Int'l, Inc., 836 F.2d,

113 (2nd Cir. 1987); Attridge, of course, held that juror testimony regarding the proper amount of the verdict it had reached was permitted, since FRE 606(b) made no provision regarding inquiries designed to confirm the accuracy of a verdict, and so juror testimony would be admissible to show the verdict delivered was not that actually agreed upon.

STATEMENT OF FACTS

Jurisdiction in this case is based upon a Federal statute, the Federal Employers' Liability Act, 45 U.S.C. 51 et seq. Plaintiff commenced suit to recover for serious injuries sustained to his left shoulder while working as a carman for Defendant on December 5, 1990, at Defendant's yard in Waterville, Maine.

ARGUMENT

A. FEDERAL RULE OF EVIDENCE 606(b) DOES NOT PROHIBIT A JURY FROM TESTIFYING OR OTHERWISE PROVIDING EVIDENCE AS TO THE ACCURACY OF ITS VERDICT, AS SUCH TESTIMONY OR OTHER EVIDENCE WOULD BE IN THE NATURE OF CLARIFICATION AND NOT IMPEACHMENT OF ITS VERDICT.

Rule 606(b) of the Federal Rules of Evidence, in part, prohibits a juror from testifying "as to any matter or statement occurring during the course of the jury's deliberations... or concerning his mental processes in connection therewith...." This rule was designed to promote "freedom of deliberations, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." Fed. R. of Evid. Advisory Committee Notes, citing McDonald v. Pless, 238 U.S. 264, 267-267 (1915). It is a well established tenet of law that a jury may not impeach its own verdict. McDonald v. Pless,

supra, stands for the broad prohibition against juror testimony in that "the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference." McDonald, 238 U.S. at 267-68.

The key case in this regard is from the Second Circuit Court of Appeals, Attridge v. Cencorp Div. of Dover Technologies Int'l, Inc., 836 F.2d, 113 (2nd Cir. 1987), which, offers clear guidance in this matter. In Attridge, the jury had rendered a verdict in the amount of $150,000.00. During a conversation with a courtroom deputy, two jurors indicated that they felt the verdict they had announced represented the total amount

that the plaintiffs were to receive, without any further reduction by the court, even though the court had instructed them not to reduce the damages.

Upon learning of this, the judge called the jury and the parties into session the following day, at which time he interviewed each juror to ascertain whether the verdict announced reflected their true intent. In approving this procedure, the Second Circuit Court of Appeals stated that "unyielding refusal to question jurors is without sound judgment where the court surmises that the verdict announced differs from the result intended." Attridge, 836 F.2nd at 114.

FRE 606(b) makes no provision regarding inquiries designed to confirm the accuracy of a verdict, and "therefore, by its own

terms, does not extend to jury testimony on the veracity of a verdict." Attridge, 836 F.2nd at 116, quoting Smith v. City of Seven Points, Texas, 608 F.Supp. 458 (E.D.Texas, 1985). Juror testimony, therefore, would be admissible to show that the verdict delivered was not that actually agreed upon. Attridge, 863 F.2nd at 116; University Computing Company v. Lykes - Youngstown Corp, 504 F.2nd 518 (5th Cir. 1974); Fox v. United States, 417 F.2nd 84 (5th Cir. 1969). The permissibility of juror testimony hinges upon the purpose for which it is offered; where the court seeks to correct the mistaken transmission of the verdict from the jury, evidence may be received. Freid v. McGrath, 135 F.2nd 833 (D.C. Cir. 1943).

In another FELA case, with a remarkably similar fact pattern, Ferrante v. Metro North Commuter Railroad, 738 F.Supp. 106 (SDNY, 1990), the jury found the plaintiff to be 40% negligent and the defendant to be 60% negligent and returned a verdict in favor of the plaintiff in the amount of $300,000.00. The court in Ferrante had specifically instructed the jury not to reduce the damages by the degree of fault apportioned to the plaintiff in its charge to the jury and on the Jury Verdict Form. After the verdict had been rendered and the proceedings had been adjourned, counsel for the plaintiff approached one of the jurors and began discussing the case. The juror indicated that they had intended the plaintiff to receive the full $300,000.00 without reduction by the court. In that case, after counsel

notified the court, the court questioned the jurors in the presence of counsel, and the jurors unanimously stated that they had intended the plaintiff to receive the full amount of $300,000.00. Subsequent thereto, the Ferrante court, under the authority of Attridge, ordered that judgment in the amount of $300,000.00 be entered in favor of plaintiff without further reduction by the court, even though it had instructed the jury not to reduce the verdict. Accordingly, there was clear precedence for the relief sought in this case. In this case, as in Ferrante, supra, counsel for the plaintiff initiated the contact with the juror following the rendering of the verdict. Upon analysis of Attridge, the Ferrante court felt that the details of the post-verdict conversation and who initiated it

were not controlling factors and did not need to be considered.

By its decision, the Court of Appeals below sides with the concept of speedy disposition of cases at the expense of the primary purpose of the court system in the United States: Justice. It makes it increasingly difficult, if not impossible, to correct mistakes that may occur from time to time in jury deliberations, which mistakes, such as the one at bar, could easily be resolved without fear of intruding onto the jury's "freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment" and in direct contradiction of the intent of the drafters of the rule, does indeed result in "simply putting verdicts beyond

effective reach [, which] can only promote irregularity and injustice." Fed. R. Evid. 606(b) Advisory Committee Notes.

B. THERE IS A FUNDAMENTAL CONFLICT BETWEEN THE HOLDINGS OF THE CIRCUIT COURTS OF APPEAL ON THE ISSUE AT BAR

Until this case, only the Fifth Circuit and Eighth Circuit Courts of Appeal had declined to follow Attridge. In Robles v. Exxon Corp., 862 F.2d 1201 (5th Cir. 1989), the court noted that it was bound by its precedent, Peveto v. Sears, Roebuck & Co., 807 F.2d 486 (5th Cir. 1987), which forbade consideration of juror testimony regarding possible confusion on the part of the jury as to the meaning of their instructions. The District Court in Robles had followed Attridge, and was reversed because of the Peveto case, which was precedence in the Fifth Circuit. The Robles court admitted

that the fact that the jurors in Attridge, having been unanimous in their insistence that a mistake in trasmitting the true verdict had occurred, made it easier to characterize that case as a mistake as opposed to misinterpretation of instructions, but declined to overturn Peveto. It went on to note, however, that the Fifth Circuit had held, in United States v. Dotson, 817 F.2d 1127 (5th Cir.), *modified on rehearing*, 821 F.2d 1034 (5th Cir. 1987), that FRE 606(b) did not bar juror testimony as to whether the verdict delivered in open court was actually that agreed upon by the jury, as such inquiry was not directed at the validity of the verdict, and thus not covered by the rule. 862 F.2d at 1207.

Similarly, in Karl v. Burlington Northern

R.R. Co., 880 F.2d 68 (8th Cir. 1989), the Eighth Circuit Court of Appeals noted the existence of precedent that conflicted with Attridge, and declined to reverse it, especially in light of the fact that neither party before it had cited or referred to Attridge.

There is strong support for the Attridge holding in the Sixth Circuit in the case of McCullough v Consolidated Rail Corporation, 937 F.2nd 1167 (6th Cir. 1991), another case with a fact pattern similar to the case at bar. In McCullough, the jury had returned a finding of 50% contributory negligence and had entered a monetary verdict of $235,000.00. The district court judge went to the jury room to thank the jurors after the verdict was returned and was at

that time asked whether the plaintiff was going to be receiving the entire $235,000.00; he thereafter informed the foreman and several other jurors present that 50% would be deducted for plaintiff's contributory negligence. Thereafter, the foreman and several other jurors advised the court that they had already deducted 50% from the verdict and had intended the net recovery to be $235,000.00. The judge then reconvened the court and, over defense objection, asked the foreman whether it was the jury's intention to bring back an award of $235,000.00 minus the 50%, to which the foreman replied in the negative and explained that their intention had been to award $235,000.00 to the plaintiff and that "it should have read $470,000.00 minus the 50%." The defendant railroad appealed the correction

of the judgment which was entered on the basis that the court's inquiry of the jury had been improper pursuant to Rule 606(b) in that it was an inquiry into their thought processes. After discussing the objectives of Rule 606(b), the court quoted with approval J. Weinstein, Weinstein's Evidence §606(04), page 606-40:

> "Rule 606(b) would not bar testimony by a juror that all the jurors agree that through inadvertence, oversight or mistake the verdict announced was not the verdict on which agreement had been reached".

Noting that the conflict between the Circuit Courts of Appeal in interpreting this rule as it applied to factors similar to this case, the Sixth Circuit was

> "persuaded that Attridge, supra,... present[s] the better reasoned approach. In utilizing this approach, the interests of justice are served in assuring that McCullough receives the award that

> the jury intended and the values protected by FRE 606(b) are not violated. The amendment of the award in no way threatened the jury's freedom of deliberation. The district court judge was careful to limit his inquiry to whether the jury intended an award of $235,000.00 minus fifty per cent. He did not inquire into the thought processes of the jurors, but merely asked for the clarification of the final award. Testimony on 'matters other than their own inner reactions involves no particular hazard to the values sought to be protected." McCullough, 937 F.2d at 1172.

The Seventh Circuit Court of Appeals has noted the holding in Attridge in the case of United States v. Ford, 840 F.2d 460 (7th Cir. 1988), but did not express an opinion one way or the other on whether it would follow the reasoning therein. Recently, however, in the case of United States v. Infelise, 813 F.Supp. 599 (N.D.Ill. 1993), the District Court cited McCullough with approval to the effect that

> "through inadvertence, oversight, or mistake the verdict announced was not the verdict on which agreement had been reached." McCullough, 937 F.2d at 1170 (quoting Weinstein's Evidence §606[04] at 606-40.

C. THE FIRST CIRCUIT COURT OF APPEALS' DIRECTIVE IN UNITED STATES v. KEPREOS DOES NOT BAR THE RELIEF SOUGHT, AS THE ULTIMATE GOAL OF THE COURT SYSTEM IS FUNDAMENTAL FAIRNESS, NOT RAPID CASE DISPOSAL.

The Court of Appeals' reliance on plaintiff's counsel's violation of its concerns for juror privacy as expressed in United States v. Kepreos, 759 F.2d 961 (1st Cir. 1985), is similarly misplaced here. Regardless of how the information about the jurors' verdict had been obtained and brought to the attention of the Trial Court, under the First Circuit's line of reasoning, nothing could be done about it, leaving correction of the jury's

mistake as to the verdict and the amount of its award of damages to the plaintiff beyond the plaintiff's effective reach.

The purpose underpinning the First Circuit Court of Appeals' ruling in Kepreos is the prevention of harassment and possible embarassment of jurors during the course of their duty as jurors by forbidding any contact with them. Although counsel for plaintiff in the case at bar may have violated the holding in Kepreos by asking the foreperson what it was the jury wanted plaintiff to receive, the *rationale* underlying the prohibition against post-verdict interviews was not. In this regard, the case of United States v Moten, 582 F.2d 654 (2nd Cir. 1978), which was cited in Kepreos as its underpinning, did *not* prohibit post-verdict contact with

jurors, but cautioned that any inquiry would have to be very limited in scope to ensure that the inquiry *would not range beyond subjects to which a juror could testify*, noting that

> "an additional factor which must be considered here is one which is seldom a matter of concern in the formulation of evidentiary rules. Human nature is such that some jurors, instead of feeling harassed by post trial interviewing, might rather enjoy it, particularly when it involves a disclosure of secrets or provides an opportunity to express misgivings and lingering doubts." Moten, 582 F.2d at 665.

It is clear that no harassment or embarrassment of the jurors was either intended or accomplished in this case, nor was there ever any intention of accomplishing the same. To ensure just results, some flexibility must be allowed. As the court below in its own decision in United States v. Boylan, 898 F.2d 230 (1st

Cir. 1990) noted in regard to inquiring into the possibility of extrinsic influence,

> "we abjure imposition of a rigid set of rules for the conduct of inquiries into the presence or extent of extrinsic influences. For one thing, the kaleidoscopic variety of possible problems counsels in favor or flexibility." 898 F.2d at 259.

The interests of justice *always* require flexibility, and the taking of evidence from the trial court jurors, either by affidavits or testimony, would promote such flexibility and justice, and would not stand as a ratification of any improper conduct on the part of any party or his attorneys.

D. A JURY POLL WOULD NOT HAVE ADDRESSED THE ISSUE AT BAR

It has long been held that the purpose of a jury poll "is to ascertain for a

certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent". Humphries v. District of Columbia, 174 U.S. 190 (1899). Although a court has substantial discretion to determine how the jury should be polled, i.e., whether by a show of hands, or by at questioning each juror individually, it is constricted to ascertaining the fact of concurrence with the verdict. Audette v. Isaksen Fishing Corp., 789 F.2d 956 (1st Cir. 1986). Indeed, its primary thrust is in the area of criminal trials, not civil trials, as evidenced by the fact that it is codified in Rule 31(d) of the Federal Rules of Criminal Procedure, but is nowhere provided for by the Federal Rules of Civil Procedure.

It is conceded that a poll was not requested, but given the strictures of the inquiry, it could not have revealed the mistake. Counsel for plaintiff had requested that the trial court inquire of the jurors whether the amount represented in Interrogatory #6 of the trial court's Special Verdict Form reflected the total damages adjudged or the net amount plaintiff was to receive; such an inquiry would not constitute a polling of the jury. Accordingly, the lack of a request for a polling of the jury is irrelevant to the issue presented.

CONCLUSION

For the reasons as set forth above, the plaintiff-appellant respectfully requests that this Court reverse the order of the

United States Court of Appeals for the First Circuit entered October 15, 1993 and vacate the order of the District Court dated January 23, 1993 and judgment entered on October 26, 1992, with instructions that plaintiff be permitted to obtain affidavits from the jurors regarding the quantum of their damage award, or, alternatively, that the jurors be questioned in open court regarding the quantum of their damage award.

Dated: December 2, 1993

Respectfully Submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DONALD PLUMMER,	)	
	)	
Plaintiff,	)	
v.	)	
	)	Civil
	)	#91-0114-B
SPRINGFIELD TERMINAL RAILWAY COMPANY,	)	
	)	
	)	
Defendant.	)	

ORDER

This matter is before the Court on Plaintiff's Motion to Alter or Amend the Judgment rendered, pursuant to a jury verdict, on October 26, 1992. Plaintiff requests the Court to conduct post-trial interviews of the jurors involved to determine whether the monetary award presented in answer to Special interrogatory Number Six was intended to be the gross award, or the net award after subtracting the appropriate percentage attributable to Plaintiff's own

negligence. For the reasons stated blow, Plaintiff's Motion is denied.

Factual Background

The facts pertinent to this Motion begin at the end of a three day jury trial involving injuries Plaintiff received while employed by Defendant Springfield Terminal Railway. At the close of the evidence, the parties presented their arguments, and the jury was instructed and sent to deliberate. The jury was given a Special Verdict Form on which to return its verdict. Upon its return, it was discovered that Special Interrogatory Number Six, requesting the amount of damages that would fairly compensate Plaintiff for his injuries, was left unanswered despite a finding that Defendant's negligence was partially responsible for Plaintiff's injuries.

The Court informed the parties that the verdict form was incomplete. The jury was then instructed that it should "retire to the jury room again, [and] go over the instructions as to damages. Figure out the damages, and return [the completed verdict form]."[1] Before the jury retired, the Court indicated to the parties that it felt it would be improper to inquire as to the reasons for the jury's failure to answer Special Interrogatory Number Six. Plaintiff's counsel agreed.

The jury eventually returned, having answered Special Interrogatory Number six in the amount of Seventy-eight Thousand Dollars ($78,000). At that point, the Court declined Plaintiff's request for a

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1 In addition to the Court's instructions, copies of which were provided to all members of the jury, the verdict form itself indicated that the answer to Interrogatory Number Six was to be the total damages that would compensate Plaintiff, without regard to Plaintiff's fault.

clarification of the verdict, finding it consistent on its face. The jury was then discharged. As the members were leaving the Courthouse, however, Plaintiff's counsel approached the jury foreperson and asked her if the jury had intended that Plaintiff receive the entire Seventy-eight Thousand Dollars. She answered that it had been the jury's intent that the entire amount be awarded to Plaintiff; that it not be reduced by Plaintiff's own negligence. This ex parte communication was immediately reported by Plaintiff's counsel, who was reminded of the prohibition against such discussion in United States v. Kepreos, 759 F.2d 961 (1st Cir. 1985). On October 26, 1992, judgment was entered for Plaintiff in the amount of Nine Thousand, Three Hundred and Sixty Dollars (Twelve percent of Seventy-

eight Thousand Dollars).

Discussion

The decision whether to conduct post-trial interviews with jurors is governed by a procedural rule. The Federal Rules of Evidence provide that a juror may not testify concerning the jury's deliberations except under limited circumstances, none of which apply to this case. Fed. R. Evid. 606(b).

Plaintiff argues that Rule 606 does not apply where the jurors would be asked only to clarify the verdict. In support of this argument, Plaintiff refers the Court to numerous decisions, most notably that of the Second Circuit in Attridge v. Cencorp. Div. of Dover Tech. Int'l., 836 F.2d 113 (2d Cir. 1987).

In contrast, Defendant cites numerous cases expounding the opposite view. The

Court acknowledges that this is a case of first impression in this Circuit, and that other Circuits are in disagreement. Given the First Circuit ruling in Kepreos, however, the Court is persuaded toward Defendant's view.

The underlying policy behind both the decision in Kepreos and Rule 606(b) is the concern that "the unbridled interviewing of jurors could easily lead to their harassment, to the exploitation of their thought processes, and to diminished confidence in jury verdicts." Kepreos, 759 F.2d at 967 (citations omitted); see also Fed. R. Evid. 606(b) advisory committee's note (citing McDonald v. Pless, 238 U.S. 264 (1915)). The advisory committee's note illuminates the extent to which the rule was intended to protect jury deliberations. In light of the

"values sought to be promoted by excluding [juror testimony]," the committee distinguishes between "extraneous information or influences" and the "manner in which the jury reached its verdict." Fed. R. Evid. 606(b) advisory committee's notes. The former are subjects on which juror testimony is admissible under the rule. Id. Included in a list of cases exemplifying the latter are cases where such testimony has not been allowed on the subjects of misinterpretation of instruction, and mistake in returning a verdict. Id. (citations omitted).

An Eighth Circuit ruling involving the application of Rule 606(b) to a similar situation is instructive. Karl v. Burlington Northern Railroad, 880 F.2d 68 (8th Cir. 1989). In Karl, the jury returned a verdict form awarding damages

in the total amount of $273,750. Plaintiff's counsel noted that $273,750 was the figure that would result from multiplying the amount plaintiff asked for in closing argument by the percent of fault the jury attributed to defendant's negligence. The attorney suspected that the jury had ignored or misunderstood their instruction to report only the total damages, without accounting for comparative fault. The court decided to interview the foreperson, who clearly indicated that plaintiff's counsel was correct. Id. at 71.

Based on affidavits later obtained from all members of the jury, plaintiff filed a Motion to correct the verdict and enter judgment in plaintiff's favor in the amount of $273,750. The district court concluded that it could properly consider

the affidavits under Rule 606(b), because the inquiry was aimed at clarifying the verdict, rather than impeaching it. Id. at 71-72. The Eighth Circuit disagreed. It stated:

> The foreman's testimony and the jurors' affidavits contain specific references to what the jurors understood or intended when the figure was written. The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule.

Id. at 74.

Plaintiff is asking the Court to make the identical inquiry of the jurors in

this case. the Court finds that such an inquiry is forbidden by Rule 606(b). Plaintiff's Motion to Alter or Amend the Judgment is hereby DENIED.

SO ORDERED.

/s/
Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine on January 20, 1993.

APPENDIX B

PLUMMER v. SPRINGFIELD TERMINAL RY. CO.

Cite as 5 F.3d 1 (1st Cir. 1993)

Donald PLUMMER, Plaintiff-Appellant,

v.

SPRINGFIELD TERMINAL RAILWAY COMPANY, Defendant-Appellee.

No. 93-1125.

United States Court of Appeals,
First Circuit.

Heard June 8, 1993.

Decided Sept. 23, 1993.

In suit under Federal Employers Liability Act, the United States District Court for the District of Maine, Eugene W. Beaulieu, Magistrate, entered judgment on jury verdict for plaintiff in amount of $9,860 after reducing jury's damages figure by 88 percent for plaintiff's contributory negligence and denied plaintiff's motion to alter judgment alleging jury error in calculating damages. Plaintiff appealed. The Court of Appeals, Torruella, Circuit Judge, held that: (1) plaintiff's requested inquiry to jury as to what jurors were thinking when they chose number that they did and whether thinking was sound was precluded by rule of evidence prohibiting inquiry into jurors' deliberations or jurors' mental processes during deliberations; (2) court's refusal to conduct voir dire of jury panel to clarify their verdict in response to

predischarge efforts of plaintiff's counsel at inquiry of jury was not abuse of discretion; and (3) plaintiff's failure to provide transcript of evidence offered at trial on liability issue precluded Court of Appeals from reaching merits of claim that jury's finding that plaintiff was 88 percent at fault was excessive and contrary to weight of evidence.

Affirmed.

1. Federal Civil Procedure ⇐1974.1

Plaintiff's requested inquiry of jury following verdict in personal injury action as to whether damages award represented amount already reduced for plaintiff's negligence went to what jurors were thinking when they chose number that they did and whether thinking was sound, rather than alleged clerical error, and thus, trial court properly precluded inquiry following jury's discharge based on rule prohibiting juror testimony about juror deliberations or mental processes. Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

2. Federal Civil Procedure ⇐1974.1

Juror testimony regarding alleged clerical error, such as announcing verdict different from that agreed upon, does not challenge validity of verdict or deliberation or mental processes and, therefore, is not subject to rule of evidence prohibiting juror from testifying about jury's deliberations or juror's mental processes when questioned about validity of verdict. Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

3. Federal Courts ⇐630

Instructions in personal injury action that jury is not to reduce damages verdict based upon plaintiff's negligence, although perhaps not ideally formulated, were not plain error, where instructions were given to jury on verdict form.

4. Federal Courts ⇐633

Even if plaintiff's appellate brief had made argument that court failed to instruct jury not to reduce damages verdict based on plaintiff's negligence, Court of Appeals' review of instructions in verdict forms that were not challenged before jury deliberations was only for plain error.

5. Federal Civil Procedure ⇐1974.1

Permitting plaintiff's attorney to obtain affidavits from jurors following verdict in negligence action as to whether damages figure represented amount already reduced for plaintiff's negligence would not have alleviated concerns regarding rule of evidence prohibiting jury from testifying about jury's deliberations or jury's mental processes during deliberations when questioned about validity of verdict or concerns of harassment of jurors and diminishment of competence in jury verdicts; like testimony, jury affidavits would have diminished stability of jury verdicts and jury's freedom to deliberate, and could just as easily lead to harassment. Fed. Rules Evid.Rules 606(b), 606 note, 28 U.S.C.A.

6. Jury ⇦76

By discussing verdict in personal injury action with jury foreperson following jury's discharge, plaintiff's attorney violated rule forbidding postverdict interview of jurors by counsel.

7. Federal Civil Procedure ⇦1974.1

Neither of plaintiff's counsel's predischarge efforts at inquiry with respect to jury's verdict in personal injury action sought voir dire to clarify recorded amount of verdict, and thus, trial court's refusal to conduct voir dire of jury panel to clarify that verdict was not abuse of discretion; counsel's first intimation of concern, when jury returned with incomplete verdict slip, did not seek clarification in light of recorded amount, and when concern ripened into specific request after jury returned on second occasion with $78,000 figure, court properly described request, without objection by attorney, as seeking "further written question" to jury which would not constitute voir dire.

8. Federal Civil Procedure ⇦1974.1

Trial court is under obligation, with appropriate instructions, to afford jury timely opportunity to straighten out both apparent and possible mistakes.

9. Federal Courts ⇦705

Plaintiff's failure to provide transcript of evidence offered at trial on liability issue in personal injury action precluded Court of Appeals from reaching merit of plaintiff's claim that jury's finding that plaintiff was 88

percent at fault was excessive and contrary to weight of evidence. F.R.A.P.Rule 10(b), 28 U.S.C.A.

10. Federal Courts ⇐696

Transcript of trial's closing statements provided by plaintiff on appeal could not be considered evidence. F.R.A.P.Rule 10(b), 28 U.S.C.A.

11. Federal Courts ⇐704

Plaintiff's failure to provide transcript of evidence offered at trial on liability issue in Federal Employers' Liability Act case precluded Court of Appeal's review on merits of plaintiff's claim that trial court improperly instructed jury on contributory negligence in light of lack of evidence on issue.

Jeremy R. Feedore, with whom McClung, Peters and Simon, Albany, NY, was on brief, for plaintiff-appellant.

Glen L. Porter, with whom Eaton, Peabody, Bradford & Veague, P.A., Bangor, ME, was on brief, for defendant-appellee.

Before TORRUELLA and SELYA, Circuit Judges, and WOODLOCK,* District Judge.

TORRUELLA, Circuit Judge.

Appellant Donald Plummer sued appellee Springfield Terminal Railway Company

* Of the District of Massachusetts, sitting by designation.

("Springfield") under the Federal Employers' Liability Act, 45 U.S.C. §§ 51–60 (1986), for injuries sustained as a Springfield employee. In Plummer's complaint, he requested $650,000 in damages. After a four day trial, the jury found Springfield 12% at fault for the injuries and Plummer 88% at fault.

At first, the jury failed to answer the interrogatory that asked the amount of damages awarded. After two bench conferences, the court sent the jury back to make the determination. The relevant interrogatory asked the jury to determine the amount that would "fairly and adequately compensate the plaintiff Donald Plummer for his injuries." Under that question, the verdict form also stated, "[i]n determining the total amount of damages, do not make any reduction because of the negligence, if any, of the plaintiff." Soon after, the jury returned with a figure of $78,000. Because $78,000 is exactly 12% of $650,000, Plummer's counsel requested that the court ask the jury if the figure was reduced for Plummer's own negligence. The court denied the request, discharged the jury and, after reducing the $78,000 figure by 88%, ultimately entered a judgment of $9,860 for appellant.

Plummer contends that when his attorney asked the jury foreperson later in the day after the jury had been discharged whether the $78,000 figure represented an amount already reduced for Plummer's negligence, the juror conceded that it had. Plummer also contends that he immediately informed

the court of this conversation and requested a voir dire of the jury to determine their true intention,[1] but that the court refused to reconvene the jury.

Several days later, Plummer formally moved to alter the judgment. The district court denied the motion, *see Plummer v. Springfield Terminal Ry. Co.*, No. 91-0114-B (D. Maine Jan. 20, 1993), and Plummer appealed. We affirm.

DISCUSSION

[1] Plummer's principal argument is that the court should have either conducted a voir dire of the jury, or permitted Plummer to obtain affidavits from the jurors in order to determine whether the damage award was reduced to account for his negligence.

Under Federal Rule of Evidence 606(b), when questioned about the validity of a verdict, a juror may not testify about the jury's deliberations or the juror's mental processes during deliberation with two exceptions: a juror may testify to (1) the deliberations with respect to outside influence; and (2) "extraneous prejudicial information."[2] The advisory committee notes for Rule 606(b) explain

1. The record contains no indication of this request.

2. Rule 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror

(footnote continued)

that "[t]he values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment." Similarly, we have observed that "the unbridled interviewing of jurors could easily lead to their harassment, to the exploitation of their thought processes, and to diminished confidence in jury verdicts, as well as to unbalanced trial results depending unduly on the relative resources of the parties." *United States v. Kepreos*, 759 F.2d 961, 967 (1st Cir.), *cert. denied*, 474 U.S. 901, 106 S.Ct. 227, 88 L.Ed.2d 227 (1985). At the same time, of course, courts must avoid "simply putting verdicts beyond effective reach [, which] can only promote irregularity and injustice." Fed.R.Evid. 606(b) advisory committee note.

[2] A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation or mental processes, and

(footnote continued)
to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

therefore is not subject to Rule 606(b). *See, e.g., Karl v. Burlington Northern Ry. Co.*, 880 F.2d 68, 73–74 (8th Cir.1989); *Eastridge Development Co. v. Halpert Associates*, 853 F.2d 772, 783 (10th Cir.1988); *see also Robles v. Exxon Corp.*, 862 F.2d 1201, 1207–08 (5th Cir.1989), *cert. denied*, 490 U.S. 1051, 109 S.Ct. 1967, 104 L.Ed.2d 434 (1989).

In the present case, Plummer similarly argues that the rendered verdict was not the one agreed upon by the jury, and therefore that his requested inquiry does not invoke Rule 606(b).

Several circuits might find this argument acceptable. In *Eastridge Development Co.*, for example, the jury, contrary to the court's instructions, reduced its verdict by the percentage of the plaintiff's own negligence. The district court interrogated the jury, accepted affidavits from the jury as to their damages calculation, and amended the ultimate award to reflect the jury's decision. The Tenth Circuit accepted the district court's rationale that the jury made a clerical error, and that the inquiry therefore did not violate Rule 606(b). *See also Attridge v. Cencorp Div. of Dover Tech. Int'l, Inc.*, 836 F.2d 113, 116–17 (2d Cir.1987).

By contrast, the Eighth Circuit in *Karl*, 880 F.2d at 73–74, reversed similar actions by a district court judge when the jury made the same mistake. The court in that case found that the inquiry was improper because it went to the thought processes underlying

the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon.

[3–6] We agree with the district court that *Karl*'s approach better reflects the goals of Rule 606(b) and our opinion in *Kepreos* because it better insulates jury deliberations. In the present case, the verdict form, which the judge went over with the jury,[3] instructed the jury not to reduce the damages verdict based on Plummer's negligence, and Plummer never objected to these instructions.[4] Plummer's current allegations, however, suggest that the jurors believed that the rendered verdict would have a different

3. Specifically, the judge stated the following with respect to the relevant interrogatory:

> And then finally, if you have reached this, what amount of money would fairly and adequately compensate the plaintiff should—plaintiff Donald Plummer for his injuries. That's the full amount, irregardless of what your answer to number five is.
>
> Determine the total amount of damages. Do not make any reductions. If you have answered three, four, and five, you do not change this figure at all.

4. At oral argument, Plummer stated that his appellate brief implicitly assigns error to the instructions on that issue. We can find no such argument in his brief. Although Plummer's brief states that he appeals from his motion to alter the district court's judgment which complained that the court failed to instruct the jury on the disputed issue, the brief does not mention a failure to instruct. Nor does the brief request a new trial on the issue of damages. Thus, we need not address the issue. *See Ryan v. Royal Ins. Co. of America*, 916 F.2d 731, 734 (1st Cir.1990) ("is-

(footnote continued)

effect on the parties, based on their understanding of the court's instructions.[5] *Karl*, 880 F.2d at 73–74; *see also Robles*, 862 F.2d at 1207–08. Plummer does not contend that the jurors never agreed upon the rendered verdict—the number that the jury chose is not in dispute. Accordingly, the requested inquiry went to what the jurors were thinking when they chose the number that they did and whether their thinking was sound.[6] *See Karl*, 880 F.2d at 73–74; *Robles*, 862

(footnote continued)

sues adverted to on appeal in a perfunctory manner, unaccompanied by some developed argumentation,' are deemed to have been abandoned"). Moreover, even if Plummer's brief had made this argument, our review of instructions and verdict forms that were not challenged before jury deliberation is only for plain error. *Phav v. Trueblood, Inc.*, 915 F.2d 764, 769 (1st Cir.1990). Although the instructions might not have been ideally formulated, they were given to the jury on the verdict form, and we observe no plain error.

5. We construe the instruction on the verdict form as part of the court's instructions to the jury.

6. We are unpersuaded by Plummer's argument that permitting him to obtain affidavits from the jurors would have alleviated the *Kepreos* and Rule 606(b) concerns. Like testimony, juror affidavits would diminish the stability of jury verdicts and the jury's freedom to deliberate, and could just as easily lead to harassment. Additionally, through affidavits, as through testimony, "the 'secret thought of one juror' would have 'the power to disturb the express conclusions of twelve.' " *Karl*, 880 F.2d at 74 (quoting *Mattox v. United States*, 146 U.S. 140, 148, 13 S.Ct. 50, 52, 36 L.Ed. 917 (1892)). Of course, Plummer's counsel is ill positioned to argue that his proposed procedure would alleviate the *Kepreos* con-

(footnote continued)

F.2d at 1205; Fed.R.Evid. 606(b), advisory committee note ("testimony or affidavits of jurors have been held incompetent to show ... misinterpretations of instructions) (citing *Farmers Co-op. Elev. Ass'n v. Strand*, 382 F.2d 224, 230 (8th Cir.), *cert. denied*, 389 U.S. 1014, 88 S.Ct. 589, 19 L.Ed.2d 659 (1967)); *but see Attridge*, 836 F.2d at 117 (characterizing similar inquiry as "ascertaining what the jury decided and not why they did so").

[7, 8] Plummer asked the district court to examine the jurors after the jury had already been discharged. This was too late.[7] We cannot conclude that the district court erred in refusing further inquiry.

(footnote continued)

cerns. Plummer's counsel already had spoken to at least one of the jurors *ex parte*. In *Kepreos*, 759 F.2d at 967, this court set out a clear rule forbidding "post verdict interview of jurors by counsel." By discussing the verdict with the jury foreperson, Plummer's attorney violated this rule.

7. We note that on the two occasions the jury returned with a verdict before it was discharged, Plummer's counsel successively intimated and requested that the court should inquire of the jurors regarding whether they were reducing the damage figure to reflect Plummer's own negligence. At oral argument, Plummer characterized his pre-discharge efforts in this regard alternatively as requests for inquiries or requests for supplemental jury instructions, depending on the question he faced from the panel. Because Plummer did not develop his vague assertions at oral argument, we consider the issue of the pre-discharge efforts at jury inquiry only as it is explicated in his brief. *See Ryan*, 916 F.2d at

(footnote continued)

[9] Finally, Plummer argues, in the alternative, that the district court should have stricken the jury's finding that he was 88% at fault because it was excessive and contrary to the weight of the evidence. However, Plummer failed to provide a transcript of the evidence offered at trial on the liability issue.

(footnote continued)
734. And his brief fails to argue that the court erred in disregarding them.

Plummer's brief frames the issue he is presenting to us as the court's refusal "to conduct a voir dire of the jury panel to clarify their verdict in light of the patently mistaken amount recorded...." Yet, however characterized, neither of Plummer's pre-discharge efforts at inquiry sought a voir dire to clarify the recorded amount in the verdict. Plummer's counsel's first intimation of concern, when the jury returned with an incomplete verdict slip, did not seek clarification in light of a recorded amount. When the concern ripened into a specific request after the jury returned on the second occasion with the $78,000 figure, the court properly described the request, without objection by Plummer, as seeking a "further written question to the jury." Such an interrogatory would not constitute a voir dire. More fundamentally, Plummer mentions in his brief only the later effort at pre-discharge inquiry and then simply as an explanation for why he did not request a poll of the jury.

While we recognize that the trial court is under an obligation "with appropriate instructions, [to] afford[ ] the jury a timely opportunity to straighten out both apparent and possible mistakes," *Poduska v. Ward*, 895 F.2d 854, 857 (1st Cir.1990), we can find no sufficient argument that the district court abused its discretion in meeting that obligation with respect to the pre-discharge efforts at inquiry made by plaintiff here.

[10] Under Federal Rule of Appellate Procedure 10(b),

> [i]f the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

See also Syncom Capital Corp. v. Wade, 924 F.2d 167 (9th Cir.1991). Accordingly, "[w]here an appellant raises issues that are factually dependent yet fails to provide a transcript of the pertinent proceedings in the district court, this circuit has repeatedly held that we will not review the allegations." *Muñiz Ramírez v. Puerto Rico Fire Services*, 757 F.2d 1357, 1358 (1st Cir.1985); *see also Farrar v. Cain*, 756 F.2d 1148 (5th Cir.1985). Because Plummer failed to provide a transcript of the relevant evidence, we do not reach the merits of his argument.[8]

[11] Similarly, Plummer's assertion that the court erred in instructing the jury on contributory negligence in light of the lack of evidence on the issue also must fail. Without a transcript of the evidence presented on the liability issue, we cannot determine whether evidence of Plummer's negligence existed.

Affirmed.

8. Although we have considered claims when feasible without the transcript of the relevant proceedings, *Valedón Martínez v. Hospital Presbiteriano*, 806 F.2d 1128, 1135 (1st Cir.1986), we can find no fair or meaningful method to review this evidentiary issue without a transcript of the evidence presented. Of course, the transcript of the trial's closing statements provided by Plummer cannot be considered evidence.

(2)

Supreme Court, U.S.
FILED
JAN 4 1994
OFFICE OF THE CLERK

No. 93-895

In The

Supreme Court of the United States

October Term, 1993

DONALD PLUMMER,

Petitioner,

against

SPRINGFIELD TERMINAL RAILWAY COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

RULES 1

STATEMENT OF THE CASE 2

ARGUMENT 3

A. Counsel for Plaintiff's conduct in initiating his extrajudicial post-verdict inquiry of the jury foreperson was illegal, and on this basis alone the Petition should be denied 3

B. The decision of the United States Court of Appeals for the First Circuit in this case does not conflict with the cases cited by Plaintiff, and therefore the Petition should be denied 4

CONCLUSION 7

APPENDIX A A1

APPENDIX B B1

TABLE OF AUTHORITIES

Page

CASES

Attridge v. Cencorp Div. of Dover Technologies Int'l, Inc., 836 F.2d 113 (2nd Cir. 1987) 4, 6

Continental Casualty Co. v. Howard, 775 F.2d 876 (7th Cir. 1985) 5

McCullough v. Consolidated Rail Corp., 937 F.2d 1167 (6th Cir. 1991) 4, 5, 6

Peveto v. Sears, Roebuck & Co., 807 F.2d 486 (5th Cir. 1987) 5, 6

United States v. Kepreos, 759 F.2d 961 (1st Cir. 1985) ... 1, 3

RULES

Fed. R. Evid. 606(b) 1, 5, 6

U.S. Dis. Ct., Maine Local Rule 7 1

OTHER AUTHORITY

Maine Code Of Professional Responsibility, Rule 3.7 ..... 1, 2, 3

RULES

In addition to Fed. R. Evid. 606(b) cited in the Petition, three rules governing attorney conduct have application in this case. The first is the rule that was articulated by the United States Court of Appeals for the First Circuit in *United States v. Kepreos*, 759 F.2d 961, 967 (1st Cir. 1985), prohibiting counsel from engaging in extrajudicial post-verdict contact with jurors. A copy of the *Kepreos* decision is attached to this Brief in Opposition as *Appendix A*.

The second rule is United States District Court for the District of Maine Local Rule 7(d)(2), which provides in relevant part as follows:

> The Code of Professional Responsibility adopted by this Court is the Code of Professional Responsibility adopted by the Supreme Judicial Court of Maine, as amended from time to time by that Court.

The third rule of attorney conduct having application in this case is Rule 3.7(f) of the Maine Code of Professional Responsibility.[1] That provision provides in relevant part as follows:

> (1) At no time shall a lawyer connected with the trial of a case communicate extrajudicially, directly or indirectly, with a juror[.]
>
> (2) After discharge of a juror from further jury service, a lawyer may ask or answer questions

---

[1] Rule 3.7 was amended subsequent to the events at issue in this Petition. The current provision is 3.7(f); formerly, it was 3.7(b). The text has remained unchanged.

> and make comments to the former juror provided the questions or comments are not intended to harass or embarrass the juror or influence the juror's action in future jury service.

Rule 3.7 of the Maine Code of Professional Responsibility is reprinted in its entirety as *Appendix B* to this Brief in Opposition.

STATEMENT OF THE CASE

Defendant generally adopts Plaintiff's Statement of the Case, but wishes to clarify two points. First, Interrogatory No. 6 of the Special Verdict Form reads in its entirety as follows:

> 6. What amount of money would fairly and adequately compensate the plaintiff Donald Plummer for his injuries? Please answer in figures: $___
>
> Please answer in words:
>
> _____ Dollars.
>
> (In determining the total amount of damages, do not make any reduction because of the negligence, if any, of the plaintiff.)

The trial judge's sidebar ruling denying Plaintiff's request for further inquiry of the jury was based on the Court's understandable conclusion that Interrogatory No. 6 was clear on its face. *See* Petition, Appendix A at 3-4.

The second point needing clarification is how (and by whom) the circumstances of the alleged juror confusion were discovered. After the jury had been discharged (but

not from the jury pool, *see* Maine Code of Professional Responsibility Rule 3.7(f)(2)), counsel for Plaintiff approached the jury foreperson and initiated, on his own, the precise inquiry which only moments before the Court had refused to undertake. It is on the basis of information acquired by this extrajudicial post-verdict juror contact that Plaintiff now seeks relief.

ARGUMENT

A. Counsel for Plaintiff's conduct in initiating his extrajudicial post-verdict inquiry of the jury foreperson was illegal, and on this basis alone the Petition should be denied.

Basic fairness dictates that Counsel for Plaintiff should not be allowed to secure for his client the relief sought in this Petition on the basis of conduct violative of *both* a clear directive of the United States Court of Appeals for the First Circuit *and* the applicable Code of Professional Responsibility. *United States v. Kepreos*, 759 F.2d 961, 967 (1st Cir. 1985), prohibits extrajudicial post-verdict juror contact *under any circumstances*; Rule 3.7(f) of the Maine Code of Professional Responsibility prohibits such contact where the jurors are not discharged finally from the jury pool, as was the case here. Accordingly, the Petition should be denied for the reason that the information of alleged juror confusion upon which it is based was discovered illegally.

B. The decision of the United States Court of Appeals for the First Circuit in this case does not conflict with the cases cited by Plaintiff, and therefore the Petition should be denied.

Plaintiff argues that the First Circuit's decision in this case is in conflict with both *Attridge v. Cencorp Div. of Dover Technologies Int'l, Inc.*, 836 F.2d 113 (2nd Cir. 1987) and *McCullough v. Consolidated Rail Corp.*, 937 F.2d 1167 (6th Cir. 1991). Those cases both hold that a trial court does not violate Fed. R. Evid. 606(b) when prior to entry of judgment it "surmises that the verdict announced differs from the result intended," *Attridge*, 836 F.2d at 114, and (1) questions the jurors regarding their understanding of the effect of the verdict, and (2) modifies the verdict to accord with the jury's then-expressed intent. It is Defendant's contention that neither *Attridge* nor *McCullough* are in conflict with the decision of the First Circuit in this case.

Two critical circumstances distinguish this case from the circumstances in *Attridge* and *McCullough*. The first is that here the trial judge did *not* "surmise[] that the verdict announced differ[ed] from the result intended." Rather, as explained above, Plaintiff's post-trial motion was based on information obtained by Plaintiff's counsel through a means that was expressly prohibited by two separate sources of law. The second circumstance is that Plaintiff's motion was filed several days *after* entry of judgment.[2]

---

[2] In this regard, it should additionally be emphasized that this Petition was filed more than one year after judgment was entered.

Both of the above-described circumstances go to the very heart of Fed. R. Evid. 606(b) and its function in the federal courts. The advisory committee described three important values sought to be promoted by the Rule: (1) freedom of jury deliberation; (2) stability and finality of jury verdicts; and (3) protection of jurors against annoyance and embarrassment. With regard to counsel for Plaintiff's extrajudicial post-verdict juror contact, even disregarding its illegality, were Plaintiff to be accorded the relief sought in the Petition, the Rule's function in protecting jurors against annoyance and embarrassment would be unavoidably frustrated. With regard to the fact that Plaintiff's motion was filed after entry of judgment, the requested relief would similarly frustrate the Rule's function in safeguarding the stability and finality of jury verdicts.

The post-verdict juror inquiry Plaintiff desires is aimed at ascertaining, not what the jury intended as its verdict, but what the jury intended to be the *effect* of its verdict. *See* Petition, Appendix B at 10-11. *However*, Plaintiff has cited no United States Court of Appeals case where such an inquiry was allowed in the face of both of the above-described circumstances. Indeed, the court in *McCullough* expressly distinguished its case from *Peveto v. Sears, Roebuck & Co.*, 807 F.2d 486 (5th Cir. 1987) and *Continental Casualty Co. v. Howard*, 775 F.2d 876 (7th Cir. 1985), both of which, as here, involved counsel seeking out the jurors after the trial, declaring that "[t]his runs counter to FRE 606(b)'s purpose to protect the jurors from

harassment or embarrassment." *McCullough v. Consolidated Rail Corp.*, 937 F.2d 1167, 1170 (6th Cir. 1991). Further, with regard to the Rule's function in safeguarding the stability and finality of verdicts, the court stated:

> This is not a case like [*Peveto* and *Howard*] where considerable time elapsed before the jurors sought to amend the verdict. Here, only minutes elapsed before the jurors' attempt to rectify their mistake[.]

McCullough, 937 F.2d at 1172.

In sum, the First Circuit's decision in this case conflicts with neither *Attridge* nor *McCullough*, nor any other United States Court of Appeals decision. Considered in the circumstances of this case, the values sought to be promoted by Fed. R. Evid. 606(b) mandated denial of Plaintiff's motion. Accordingly, the Petition should be denied.

CONCLUSION

Counsel for Plaintiff's extrajudicial post-verdict contact with the jury foreperson was illegal, and for this reason alone the Petition should be denied. Further, the decision of the United States Court of Appeals for the First Circuit conflicts with no case cited by Plaintiff. For this additional reason, the Petition should be denied.

Dated: January 4, 1994.

SPRINGFIELD TERMINAL RAILWAY CO.

By /s/ Glen L. Porter
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APPENDIX A

UNITED STATES of America,
Appellee,

v.

Constantine T. KEPREOS,
Defendant, Appellant.

No. 84-1051.

United States Court of Appeals,
First Circuit.

Argued Nov. 8, 1984.

Decided March 29, 1985.

Rehearing and Rehearing En Banc
Denied April 26, 1985.

Joan A. Lukey, Boston, Mass., by appointment of the court, with whom Hale & Dorr, Boston, Mass., was on brief, for defendant, appellant.

Brackett B. Denniston, III, Asst. U.S. Atty., Boston, Mass., with whom William F. Weld, U.S. Atty., Boston, Mass., was on brief, for appellee.

Before CAMPBELL, Chief Judge, McGOWAN,* Senior Circuit Judge, and TORRUELLA, Circuit Judge.

TORRUELLA, Circuit Judge.

In his second trial, after the first ended in mistrial, a jury found appellant Constantine T. Kepreos guilty of two counts of mail fraud in violation of 18 U.S.C. § 1341 and two counts of Commodity Exchange Act violations under 7 U.S.C. §§ 13(b) and 6o(1). The government charged

---

* Of the District of Columbia Circuit, sitting by designation.

appellant and others with engaging in a scheme to defraud investors who had purchased interests in commodity pools operated by two companies, Northeast Investment Services, Inc. (NIS) and Boston Trading Group, Inc. (BTG), both of which were partially owned by appellant.

The indictment alleged that defendants had mailed fraudulent sales literature, and "churned" commodity pools operated by NIS and BTG.[1] Counts in the first category pertained primarily to Northeast, and those in the second primarily to BTG.

Appellant's first trial began on June 13, 1983. His principal defense was that he was unaware of the fraudulent schemes alleged by the government, and that he could not have been expected to recognize them due to certain organic and psychological deficiencies that he suffered. As a result of these alleged deficiencies, he claimed that he lacked the specific intent necessary to support a conviction. After a five-week jury trial, a mistrial was declared because the jury was unable to reach agreement on a verdict.[2]

---

[1] The practice known as "churning" is the excessive trading for the primary purpose of obtaining commissions without significant regard to whether the investor realizes a profit or not. *See Miley v. Oppenheimer & Co., Inc.*, 637 F.2d 318, 324 (5th Cir.1981); *Van Alen v. Dominick & Dominick, Inc.*, 560 F.2d 547, 549 (2d Cir.1977); *see also Horne v. Francis du Pont & Co.*, 428 F.Supp. 1271, 1274 (D.D.C.1977).

[2] Fifteen counts of the indictment were dismissed at the close of arguments. The jury acquitted appellant on the only wire count left, and was unable to reach a verdict as to the remaining counts.

A second jury trial commenced on October 3, 1983. The government presented forty-seven witnesses and over one hundred and seventy-five exhibits, numbering in the thousands of pages. Appellant called fourteen witnesses and testified in his own defense. The jury found appellant guilty of two counts of mail fraud as to the NIS scheme and two counts of fraud in violation of the Commodity Exchange Act in connection with the BTG scheme. He was acquitted on nine other counts dealing with both schemes, and the jury reported that it was unable to reach an agreement as to three other counts. On January 9, 1984, appellant was sentenced to eighteen months imprisonment and a three-year term of probation.

This appeal essentially arises from the trial court's rulings in four areas: the exclusion of expert psychiatric and psychological testimony offered by appellant; the exclusion in the second trial of a record, admitted in the first trial, that a codefendant who testified for the government had once pleaded guilty to a charge of accepting a bribe as a witness; the denial of appellant's motion seeking that immunity be given to a witness; and, finally, denial of appellant's motion to dismiss the indictment and, otherwise, failure to provide adequate curative actions against alleged prosecutorial misconduct in connection with the prosecutor's contacting of jurors after the first trial.

With this background in mind, we turn to appellant's claims.

I. *Exclusion of Expert Testimony*

Appellant first claims error in the exclusion of expert testimony by the district court. He offered this testimony to show that he suffered from physical and psychological difficulties which adversely influenced his ability to attend to subtle details in his surroundings and to draw conclusions therefrom. The evidence was excluded by the trial court.

Appellant contends that the expert testimony was relevant to the issue of his intent. It was offered, he argues, not to show diminished capacity or lack of capacity to form specific intent, but to present an expert basis for his lack of awareness as to the existence of schemes to defraud. Appellant also contends that because the testimony was exculpatory and critical to his defense, its exclusion violated his sixth amendment right to present a defense and rebut the Government's charges.

Rule 403 provides that even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." It is well established that district courts have broad discretion to exclude evidence under this rule. *United States v. Hooton*, 662 F.2d 628, 636 (9th Cir.1981), *cert. denied*, 455 U.S. 1004, 102 S.Ct. 1640, 71 L.Ed.2d 873 (1982); *United States v. Medico*, 557 F.2d 309, 317 (2d Cir.), *cert. denied*, 434 U.S. 986, 98 S.Ct. 614, 54 L.Ed.2d 480 (1977). Only in exceptional circumstances

will reversible error be found in the district court's determination of the probative value of testimony in a particular case. *United States v. Schmidt*, 711 F.2d 595, 599 (5th Cir.1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 705, 79 L.Ed.2d 169 (1984). Besides, a wide assortment of relevant evidence is, constitutional arguments notwithstanding, deliberately excluded by trial courts by reason of counterbalancing factors that are believed to be of greater moment than the unfettered admission of relevant testimony. *See Wahrlich v. State of Arizona*, 479 F.2d 1137, 1138 (9th Cir.) (per curiam), *cert. denied*, 414 U.S. 1011, 94 S.Ct. 375, 38 L.Ed.2d 249 (1973); *see also United States v. Schmidt*, *supra*.

With these principles as a framework, we first note that appellant was capable of forming the intent required by the statutes under which he was prosecuted. Kepreos did not rely on an insanity defense, and the evidence in question was allegedly not offered to prove either diminished capacity or lack of capacity to form specific intent. In other words, he did not question his capacity to form intent but nonetheless was interested in having the jury receive psychiatric evidence on such issue.

We find psychiatric testimony in these circumstances to be both misleading and of questionable utility.[3] The district court, therefore, correctly excluded the evidence.

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[3] Both experts had testified on voir dire that appellant had full capacity to deceive, lie, and to control his conduct. Moreover, the relationship between the experts' findings and the capacity to form intent was described as speculative by the psychiatric expert.

United States v. Castell, 584 F.2d 87, 89 (5th Cir.), *cert. denied*, 440 U.S. 925, 99 S.Ct. 1256, 59 L.Ed.2d 480 (1978).[4]

Next, appellant argues that the trial court erred in rejecting the proffered testimony as evidence of character or personality traits under Fed.R.Evid. 404(a)(1) and 405(a). In his view, expert testimony would have shown that he had the following "personality traits": avoidance, denial, repression, naivete, dependency, and tunnel vision.

The term "character trait" is nowhere defined in the Federal Rules of Evidence. There is no indication whatsoever that either the draftmen or Congress had in mind admitting evidence of broad psychological traits or clinical states such as "repression" or "dependency" or the other similar characteristics about which appellant's experts proposed to testify, perhaps most notably "tunnel vision." The trial judge excluded the testimony on the basis of her legitimate concern that it might confuse the jury, an opinion which we fully share. We are thus satisfied that there was no error below on this point. *See United States v. MacDonald*, 688 F.2d 224, 227-28 (4th Cir.1982), *cert. denied*, 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983).

Appellant's third point with respect to the exclusion of expert testimony relates to the jury instructions given

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[4] We also note that other Circuits have rejected psychiatric testimony when offered not in connection with an insanity defense, but to support a defense of diminished capacity. *See Campbell v. Wainwright*, 738 F.2d 1573, 1582 (11th Cir. 1984); *Muench v. Israel*, 715 F.2d 1124, 1142-44 (7th Cir.1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 2692, 81 L.Ed.2d 878 (1984).

at trial. The court had instructed the jurors that an intent to defraud could be based on a finding of either positive knowledge of events, or a deliberate indifference to them. Nonetheless, appellant contends, the court refused to allow expert testimony that could have rebutted the charge that he was deliberately indifferent. On the basis of the admissible evidence presented, we find that the trial court gave the jury correct instructions on the issue of specific intent. *See United States v. Brien*, 617 F.2d 299, 312 (1st Cir.), *cert. denied sub nom. Labus v. United States*, 446 U.S. 919, 100 S.Ct. 1854, 64 L.Ed.2d 273 (1980). Since the trial court thus acted well within the parameters imposed upon it by the law, we cannot find a violation of constitutional rights in the combination of the district court's valid judgment on proffered evidence and the charge given on the issue of intent.

II. *Other Evidentiary Claims*

In 1976, appellant's codefendant, Richard Shaw, pleaded guilty in a Florida state court to the crime of accepting a bribe as a witness. Adjudication of guilt was withheld pursuant to a procedure established by a Florida statute. *See* West's F.S.A. Sec. 948.01(3). The district court refused to admit evidence of the Florida plea despite appellant's contention that it was relevant to challenge Shaw's credibility. Appellant claims the court committed reversible error in limiting his cross-examination of this witness.

Trial courts are granted broad discretion to determine the scope and extent of cross-examination. *United States v. Honneus*, 508 F.2d 566, 572 (1st Cir. 1974), *cert. denied*, 421

U.S. 948, 95 S.Ct. 1677, 44 L.Ed.2d 101 (1975). However, it is fully recognized that the right of a defendant in a criminal case to establish the bias of witnesses against him through cross-examination is an important component of the sixth amendment right to confrontation. *Davis v. Alaska*, 415 U.S. 308, 315-17, 94 S.Ct. 1105, 1109-10, 39 L.Ed.2d 347 (1974); *United States v. Jarabek*, 726 F.2d 889, 992 (1st Cir.1984). Thus, a trial court may limit cross-examination, but only after there has been permitted a certain threshold level of cross-examination that satisfies the constitutional requirement. *Niziolek v. Ashe*, 694 F.2d 282, 289 (1st Cir.1982). If the jury has sufficient evidence before it bearing on the witness' bias, the court need not permit unending excursions into each and every matter touching upon veracity. *United States v. Fortes*, 619 F.2d 108, 118 (1st Cir.1980).

Under these principles, we see no merit in appellant's argument that the court's decision unduly restricted his constitutional right to impeach the credibility of this witness. Moreover, even if the plea should have been allowed into evidence, we find its exclusion by the district court a harmless error.

First, appellant had abundant opportunity to expose Shaw's motive for testifying and to impeach his credibility generally. Counsel brought out that Shaw had entered into a plea agreement before indictment; that twenty-eight of thirty-one counts against him had been dismissed (hence reducing his maximum punishment by 140 years); and, that the Government had agreed to recommend no more than five years imprisonment. In addition, the jury had other information on Shaw's major role in the fraud, including his alleged receipt of over

$1,000,000. The court gave an accomplice-witness instruction urging the jury to exercise caution as to any such testimony. The only restriction imposed by the district court referred to Shaw's plea. Under these circumstances, the court did not deny appellant "the constitutionally required threshold level of inquiry" into a government witness' motivation for testifying. *United States v. Tracey*, 675 F.2d 433, 437 (1st Cir.1982).

Second, Shaw's testimony was in any event only corroborative in that a great deal of evidence from other sources was presented on the same issues that Shaw referred to in his testimony. We thus are convinced that the judgment was not substantially swayed by any potential error and that, if in fact there was an error, it had but slight effect on the jury.

III. *Pullen's Testimony*

At trial, appellant sought to offer the testimony of Robert B. Pullen, the President and Chief Financial Officer of First Pullen Commodity Services, Inc. (First Pullen). First Pullen was the futures commission firm responsible for executing commodities transactions for BTG and NIS. Pullen was the individual at First Pullen who received and transmitted trade orders from and to NIS and BTG.

Anticipating that Pullen would assert his Fifth Amendment privilege against self-incrimination during appellant's trial, appellant's counsel requested that the Government grant immunity to Pullen. Having been denied this request, appellant's counsel filed a motion in the district court asking the court either to immunize

Pullen, to order the Government to grant Pullen use immunity, or to dismiss the indictment with prejudice. The court rejected these alternatives. Nevertheless, appellant was given the opportunity to read into the record testimony given by Pullen before a grand jury in previous proceedings. This testimony was substantially equivalent to that which the appellant had sought to elicit at trial by putting Pullen on the witness stand.

Appellant argues that the failure to immunize Pullen amounted to a denial of due process rights and the right to "compulsory process for obtaining witnesses in his favor" as granted by the sixth amendment. In appellant's view, he was further deprived of due process because of governmental selectiveness in its granting of immunity to other witnesses. This, he claims, rendered the trial fundamentally unfair because it allegedly resulted in the presentation to the jury of only a misleading portion of the whole story. Appellant also contends that said unfairness was later magnified when the Government argued to the jury that Pullen's grand jury testimony should not be given as much weight as the testimony of a live witness.

The fact that Pullen was not given immunity did not prejudice appellant. Pullen provided the same testimony to the grand jury that appellant sought for his own trial. This evidence, albeit read into the record, was admitted at trial. The jury was not deprived of considering the allegedly essential and exculpatory information in appellant's favor. Thus, the judicial fact-finding process has not been rendered unfair because of the absence of Pullen's live testimony. *See United States v. Alessio*, 528 F.2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948, 96 S.Ct. 3167, 49 L.Ed.2d 1184 (1976).

Furthermore, we cannot conclude that the trial was rendered unfair by the prosecutor's comment that live testimony was more reliable than the written transcript of Pullen's grand jury testimony. Although the comment was less than politic, any difficulty in this regard was corrected when the court gave the jury prompt curative instructions to which appellant did not object. In light of the court's alert and appropriate instructions, we find no prejudice to appellant in the comment by itself or in its allegedly cumulative effect upon the factual image presented to the jury throughout the trial, particularly when considered against a backdrop of overwhelming evidence against appellant.

IV. *Prosecutorial Misconduct*

According to appellant, unbeknownst either to the trial court or to the defense, the Assistant U.S. Attorney contacted at least one of the first trial jurors and learned the purported numerical split, the identity of the jurors who were not persuaded beyond a reasonable doubt, and, further, their reasons for having been unwilling to convict appellant in the first trial.

It was not until the fourth day after the impanelment of the jury in the second trial that the government disclosed the substance of the information in question. By that time, however, the following had already taken place: the impanelment of the jury; opening statements from the parties; the complete direct and cross-examination of one government witness; and, finally, the completion of the direct examination of another. Moreover, after the jury was initially impaneled and excused for the day, the court raised the matter of sharing the information

gained by the government, but to no avail. Defense counsel then stated the need for dismissal, pointing out that appellant would never be able to overcome what she called the "unfair advantage" gained by the government in the jury-selection process and the first three days of the trial.

Appellant contends that this "unfair advantage" deprived him of any opportunity for a fair trial. He urges us to either dismiss the indictment or reverse the conviction and remand the case with appropriate limitations placed on prosecutorial conduct.

We start with the proposition that henceforth this Circuit prohibits the post-verdict interview of jurors by counsel, litigants or their agents except under the supervision of the district court, and then only in such extraordinary situations as are deemed appropriate. Permitting the unbridled interview of jurors could easily lead to their harassment, to the exploitation of their thought processes, and to diminished confidence in jury verdicts, as well as to unbalanced trial results depending unduly on the relative resources of the parties. *See United States v. Moten*, 582 F.2d 654, 665-67 (2d Cir.1978); *Miller v. United States*, 403 F.2d 77, 82 (2d Cir.1968); *Rakes v. United States*, 169 F.2d 739, 745-46 (4th Cir.1948); *Commonwealth v. Fidler*, 377 Mass. 192, 202-03, 385 N.E.2d 513, 519-20 (1979). Such outcomes, or even the appearance of the same, we are not willing to tolerate. Thus, future incidents like the one described above will not be countenanced.

The issue here, however, is whether in the present context the retroactive application of the rule we have just announced should warrant reversal or dismissal.

Ordinarily, questions concerning the ethical behavior of prosecutors are presented in the context of an appeal

by a defendant who complains that an impropriety rendered his conviction invalid. *See Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (failure to disclose exculpatory evidence); *Napue v. Illinois,* 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) (knowing use of false testimony at trial); *United States v. Basurto,* 497 F.2d 781 (9th Cir.1974) (use of perjured testimony to procure indictments). Where such a basis for the allegations is proven, and the misdeeds are thus found to have impugned the fundamental fairness of the trial, precedent authorizes reversal of the conviction and remand for a new trial. *See Brady v. Maryland, supra.* The dismissal of the indictment has been invoked only in egregious or extreme circumstances. *Ramos Colón v. U.S. Attorney for District of Puerto Rico,* 576 F.2d 1, 4 (1st Cir.1978). Such circumstances are not before us in the present case, particularly when we consider that the prosecutor did not violate any rule in effect at the time of his actions.[5]

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[5] In the Commonwealth of Massachusetts the applicable rule is set out in Massachusetts Supreme Judicial Court Rule 3:07, DR7-108(D), as follows:

> After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated to harass or embarrass the juror or to influence his actions in future jury service.

Subsequent to the effective date of this rule, the Supreme Judicial Court held in *Commonwealth v. Fidler,* 377 Mass. 192, 203, 385 N.E.2d 513, 520 (1979) that "counsel, litigants, and those acting for them may not independently contact jurors after a verdict is rendered." It reasoned

> We think the jury system is best protected by a rule requiring that any post-verdict interviews of jurors by counsel, litigants, or their agents take place under the

Juror contacts in the instant case did not cause any prejudicial evidence to be admitted at trial or any exculpatory evidence to be suppressed from it. Also, defense counsel received a disclosure of the information possessed by the government, even if somewhat tardily.

> supervision and direction of the judge. We decline to permit unrestricted post-trial interviews, as we think such a practice would defeat the important interests protected by restrictions on the use of juror testimony to impeach verdicts. Moreover, permitting unbridled interviews of jurors could lead to harassment of jurors, exploitation of jurors' thought processes, and diminished confidence in jury verdicts. See *United States Moten*, 582 F.2d 654, 664-665 (2d Cir.1978); 51 A.B.A.J., *supra* at 158.

Id. at 202, 385 N.E.2d at 519.

Appellant argues that this decision is a gloss on DR7-108(D), and that because the United States District Court for the District of Massachusetts Local Rule 5(d)(4)(B) adopts as its guide for professional conduct in this case the Massachusetts Code of Professional Responsibility, "as amended from time to time by [the highest court of the commonwealth]," the prosecution here violated both state and federal court ethical standards. However, the Supreme Judicial Court did not cite to DR7-108(D) in *Fidler*, so the federal prosecutor could have believed that *Fidler* applied only to conduct in the state court, and that he was bound only by the language of DR7-108(D), which does not expressly mention seeking prior permission before jury interviews, *see, e.g., Annotated Code of Professional Responsibility* 368 (ABA Found. 1979); *Professional Responsibility* 163 (ABA 1978). In view of the lack of clarity, we shall give the prosecution the benefit of the doubt in this case, while making clear that we concur in the rationale of *Fidler* and will expect counsel to adhere to that rule in the future, not only in the District of Massachusetts and Puerto Rico where there are requirements to this effect in the local courts, but also in the other districts within this circuit.

Although such disclosure took place on the forth day of the trial, the trial lasted six weeks and involved more than 60 witnesses. In addition there is no evidence that contacts with jurors from the first trial resulted in a prejudiced or biased jury for the second trial. Consequently, as a matter of demonstrable reality, the contacts in question did not impugn or distort the fairness and integrity of the judicial fact-finding process in such a way as to warrant, as pressed by appellant, either a reversal or dismissal of the indictment. The trial court therefore, committed no reversible error.

For the reasons stated, the district court is *affirmed.*

APPENDIX B

3.7 Conduct During Litigation

(a) Improper Legal Action. A lawyer shall not file a suit, assert a position, delay a trial, or take other action on behalf of a client when the lawyer knows, or should know, that such action would merely serve to harass or maliciously injure another.

(b) Improper Concealment, Statement or Evidence. A lawyer shall not knowingly make a false statement, conceal information legally required to be revealed, or participate in the creation or preservation of false evidence.

(c) Interest in Litigation. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) Assert a lien granted by law against the proceeds of such action or litigation to secure the lawyer's fee or expenses. This paragraph does not authorize an attorney to assert a lien on a client's file in order to secure payment of a fee. The assertion of such a lien (if any exists) is improper; and

(2) Contract with a client for a reasonable contingent fee as provided in rule 8.

(d) Financial Assistance. While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical

examination, and expenses of obtaining and presenting evidence.

(e) Adversary Conduct.

(1) In appearing in a professional capacity before a tribunal, a lawyer shall:

(i) Employ, for the purpose of maintaining the causes confided to the lawyer, such means only as are consistent with truth, and shall not seek to mislead the judge, jury, or tribunal by any artifice or false statement of fact or law;

(ii) Disclose unless privileged or irrelevant, the identities of all the clients the lawyer represents.

(2) In appearing in a professional capacity before a tribunal, a lawyer shall not:

(i) Intentionally misquote to a judge, jury, or tribunal the language of a book, statute, or decision or, with knowledge of its invalidity and without disclosing such knowledge, cite as authority, a decision that has been overruled or a statute that has been repealed or declared unconstitutional;

(ii) State or allude to any matter that the lawyer has no reasonable basis to believe is relevant to the case or will not be supported by admissible evidence;

(iii) Ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person;

(iv) Assert personal knowledge of the facts at issue, except when testifying as a witness;

(v) Assert a personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but a lawyer may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters stated therein; or

(vi) Engage in undignified or discourteous conduct that is degrading to a tribunal.

(f) Communication With Jurors.

(1) At no time shall a lawyer connected with the trial of a case communicate extrajudicially, directly or indirectly, with a juror, with anyone the lawyer knows to be a member of the pool from which the jury will be selected, or with any member of such person's family.

(2) After discharge of a juror from further jury service, a lawyer may ask or answer questions and make comments to the former juror provided the questions or comments are not intended to harass or embarrass the juror or influence the juror's action in future jury service.

(3) A lawyer shall reveal promptly to the court knowledge of improper conduct by a juror or member of the jury pool, or by another toward a juror or member of the jury pool, or a member of the juror's or jury-pool member's family.

(g) Contact With Witnesses. A lawyer shall not:

(1) Suppress any evidence that the lawyer or a client has a legal obligation to reveal or produce;

(2) Advise, or directly or indirectly cause, a person to hide or to leave the jurisdiction of a tribunal for the

purpose of making that person unavailable as a witness therein; or

(3) Directly or indirectly pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of the testimony of the witness or the outcome of the case; but unless prohibited by law, a lawyer may advance, guarantee, or acquiesce in payment of:

(i) Expenses reasonably incurred by a witness in attending or testifying;

(ii) Reasonable compensation to a witness for his loss of time in attending or testifying; and

(iii) A reasonable fee for the professional services of an expert witness.

(h) Contact With Officials.

(1) A lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal unless the personal or family relationship between the lawyer and the judge, official, or employees is such that gifts are customarily given and exchanged. This paragraph does not preclude contributions to election campaigns of public officers.

(2) In the absence of opposing counsel, a lawyer shall not directly or indirectly communicate with or argue before a judge or tribunal upon the merits of a contested matter pending before such judge or tribunal, except in open court; nor shall the lawyer, without furnishing opposing counsel with a copy thereof, address a written communication to a judge or tribunal concerning the

merits of a contested matter pending before such judge or tribunal. This paragraph does not preclude communications permitted by rule of court. For purposes of this paragraph the term "opposing counsel" includes a party who has no counsel.

(i) Duty of Public Prosecutor.

(1) A lawyer shall not institute or cause to be instituted criminal charges when the lawyer knows, or it is obvious, that the charges are not supported by probable cause.

(2) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to a defendant without counsel, of the existence of evidence that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

(3) A public prosecutor or other government lawyer shall not conduct a civil or criminal case against any person whom the lawyer represents or has represented as a client.

(4) A public prosecutor or other government lawyer shall not conduct a civil or criminal case against any person relative to a matter in which the lawyer represents or has represented the complaining witness.

(j) Extra-Judicial Publicity. A lawyer involved in the prosecution or defense of a criminal matter or in representing a party to a civil cause shall not make or participate in making any extra-judicial statement which

poses a substantial danger of interference with the administration of justice.

[Amended effective December 14, 1981; July 1, 1990.]